

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

JOSEPH COLELLA,
JOSEPH TIMMERMAN,
KELLY STYLES LONGO, and
SANDRA STYLES-HORVATH,
on behalf of themselves and other
similarly situated persons,

Plaintiffs,

v.

ATKINS NUTRITIONALS, INC.,

Defendant.

**SECOND AMENDED CLASS ACTION
COMPLAINT**

CASE NO.: 17-cv-5867-KAM-SJB

Jury Demand

PUBLIC REDACTED VERSION

CONFIDENTIAL MATERIALS REDACTED

Plaintiffs bring this Second Amended Complaint against Defendant on their behalf and on behalf of all other persons similarly situated who purchased Atkins Nutritionals products that claimed that sugar alcohols have no impact on blood sugar. In support of their Second Amended Complaint, Plaintiffs respectfully submit the following:

NATURE OF THE CASE

1. This case concerns the labeling used by Atkins Nutritionals, Inc. when it touts its products as having low “net carbs” by artificially subtracting a whole category of carbs (sugar alcohols) from the definition of carbs. Atkins’ labeling and marketing schemes claim its products have low “Net Carbs” even though the products contain sugar alcohols.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

2. When it calculates “net carbs” for labeling purposes, Atkins subtracts carbohydrates associated with sugar alcohols from its calculation. Atkins’ formula is based on its claim that sugar alcohols minimally impact blood sugar. However, this is false, and even Atkins has characterized the term “net carbs” as “imprecise.”

3. Simply put, Atkins’ claim that sugar alcohols, particularly maltitol, minimally impact blood sugar and thus should not be included in a consumer’s carbohydrate count is wrong, meaning that the labeling and representations regarding Net Carbs are also wrong. Atkins affirmatively misrepresents and conceals these facts from consumers in violation of New York law.

4. Plaintiffs thus bring this suit on their own behalf, and on behalf of other affected purchasers in the State of New York, to obtain all remuneration available under the law and at equity.

PARTIES

5. Plaintiff Joseph Colella is an adult domiciled in Queens County, New York and is therefore a citizen of the State of New York.

6. Plaintiff Joseph Timmerman is an adult domiciled in Boca Raton, Florida and is therefore a citizen of the State of Florida. He has purchased Defendant’s products in New York for the last several years.

7. Plaintiff Kelly Styles Longo is an adult domiciled in Williamsville, New York and is therefore a citizen of the State of New York.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

8. Plaintiff Sandra Styles-Horvath is an adult domiciled in North Ft. Myers, Florida and is therefore a citizen of the State of Florida. She also maintains a residence in Buffalo, New York and has purchased Defendant's products in New York for the last several years.

9. Defendant is a corporation organized under the laws of Colorado with headquarters located at 1050 17th Street, Ste. 1000, Denver, Colorado 80265-1001 and is therefore a citizen of the State of Colorado.

JURISDICTION AND VENUE

7. The United States District Court for the Eastern District of New York has subject matter jurisdiction over all claims in this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) ("CAFA"). The aggregated claims of the individual class members exceed the sum value of \$5,000,000, exclusive of interest and costs, and this is a class action in which more than two-thirds of the proposed plaintiff class, on the one hand, and Defendant, on the other, are citizens of different states.

8. This Court has personal jurisdiction over Atkins because Atkins is registered to conduct business and does, in fact, regularly conduct business, in New York.

9. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District.

FACTUAL ALLEGATIONS

A. Background

10. Defendant Atkins has concealed material facts from consumers in that it failed to disclose that sugar alcohols impact blood sugar.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

11. Atkins also made false, misleading statements to deceive consumers into purchasing its products when it advised consumers that sugar alcohols have a “minimal” impact on blood sugar – a contention that is unsupported by the scientific evidence.

12. Defendant Atkins is the eponymous company formed by the late Dr. Robert Atkins (hereinafter “Dr. Atkins”) to promote the sale of books and food items related to the “Atkins Diet,” a low- to no-carbohydrate diet.

13. To follow the Atkins Diet, users must forsake carbohydrates which are present in most processed foods in the average American’s diet. In 1999, at the time the Atkins Diet was gaining sweeping popularity, the late Dr. Atkins informed adherents that the most popular artificial sweeteners that American manufacturers use to replace conventional sugars were not approved for use in the Atkins Diet. Dr. Atkins wrote, “Sweeteners such as sorbitol, mannitol, and other hexitols [i.e. sugar alcohols] are not allowed.” See Robert C. Atkins, M.D., *Dr. Atkins’ New Diet Revolution* (Rev.) at p. 100 (1999).

14. Dr. Atkins’ diet was based on dramatic reduction of “glycemic” carbohydrates, that is, those carbs that turn into sugar upon entering the blood stream. Defendant has explained:

“Glycemic” simply means “relating to sugar.” The higher the glycemic impact of a food ... the greater and more rapid its effect on your blood sugar when you eat it – and the more insulin required to return your blood sugar to normal. Since insulin is a fat-storage hormone and since overweight people often already produce too much of it, high blood sugar and high insulin can sabotage your weight-management and better health efforts. Eating lower glycemic foods is definitely the way to go.¹

15. Traditional dieting approaches distinguish between “simple carbs” like sugar and white flour and “complex carbs” like fruits, potatoes, and whole grains. But Dr. Atkins believed

¹ <https://www.atkins.com/how-it-works/library/articles/the-low-glycemic-approach-to-healthy-eating> (last accessed Dec. 19, 2018).

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL DESIGNATED
CONFIDENTIAL BY DEFENDANT ATKINS NUTRITIONALS, INC.

that this distinction failed to capture the actual effects of different carbohydrates on blood sugar. The Atkins approach instead endorses the “glycemic index” as a “better gauge of the impact of various carbohydrates on your blood sugar.” Dieters should therefore “pay closer attention not only to the amount of carbohydrates consumed, but also to their position on the glycemic index.”²

16. As explained by Atkins, the glycemic index (or “GI”) measures “the relative impact of carbohydrate foods on blood sugar. The GI of a particular food is determined by comparing the effect of a 50-gram portion on blood sugar to that of a 50-gram standard such as a glucose solution or white bread. The higher a food’s GI, the faster and greater its effect on your blood sugar. Sucrose, or table sugar (illegal on the Atkins diet), has a glycemic index of 63. Whole grain pumpernickel bread (illegal on the Atkins diet) has a GI of 46. All-Brain cereal (illegal on the Atkins diet) has a GI of 45. White rice (illegal on the Atkins diet) has a GI of 66. Pancakes (illegal on the Atkins diet) have a GI of 67. Whole-grain spaghetti (illegal on the Atkins diet) has a GI of 32. A doughnut (illegal on the Atkins diet) has a GI of 76.”³

17. The International Table of Glycemic Index and Glycemic Load lists the following GI values for various products, compared to nearly pure maltitol:

PRODUCT	GI
25g Malbit CR (87% maltitol)	30 ± 12
Peanut M & M’s	33 ± 3
Twix	44 ± 6
25g Maltidex 100 (> 72% maltitol)	44 ± 11
Potato crisps, plain, salted (Canada)	51 ± 7
Snickers	68
M & M’s	68 ± 12
25 g Malbit CH (99% maltitol)	73 ± 29
25 g Maltidex 200 (50% maltitol)	89 ± 28

² <https://www.atkins.com/how-it-works/library/articles/the-importance-of-the-low-glycemic-impact-part-2> (last accessed Dec. 19, 2018)

³ <https://lpi.oregonstate.edu/mic/food-beverages/glycemic-index-glycemic-load> (last accessed Dec. 19, 2018).

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

18. The International Table also lists equivalent GI values for chocolate milk products sweetened with table sugar (sucrose) versus maltitol:

PRODUCT	GI
Chocolate, milk, plain with sucrose	34 ± 5
Chocolate, milk, plain, low-sugar with maltitol	35 ± 16

19. “Health potential of polyols as sugar replacers” also compiles GI tests of maltitol that can be compared to results for table sugar and other sugar alcohols. Nine independent tests of maltitol revealed relative blood sugar responses between 40 to 78 percent of the impact of common table sugar. But not all sugar alcohols are equal. Mannitol has zero impact on blood sugar. Sorbitol has an impact between six to 22 percent of table sugar. And xylitol has an impact between 11 to 29 percent.⁴

20. In 2002, Dr. Atkins revised his prohibition against sugar alcohols, including specifically maltitol. He stated, “certain sugar alcohols such as maltitol do not affect blood sugar and are acceptable.” Robert C. Atkins, M.D., *Dr. Atkins’ New Diet Revolution* (3rd ed.) at p. 112 (2002).

21. What changed? Between 1999 and 2002, Atkins established a growing line of food products that included sugar alcohols, including the products at issue in this case.

22. In a website section called “How to Read a Food Label,” Atkins tells consumers on its website that “All Carbs Are Not Created Equal,” explaining:

Not all types of carbohydrates behave the same way in your body. For example, when your body digests table sugar, it turns it immediately into blood sugar. Other carbs, such as sugar

⁴ Geoffrey Livesey, “Health potential of polyols as sugar replacers, with emphasis on low glycermic properties,” *Nutrition Research Reviews* 2003: 16:16-91, p. 170.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

alcohols, have a minimal impact on blood-sugar levels. Still other carbs, such as dietary fiber, pass through your body without having any impact on blood-sugar level. To date, the FDA has not focused on these important biochemical differences and treats all carbohydrates alike.⁵

23. In its “How to Read a Food Label” section, Atkins omits any discussion of maltitol, its sugar alcohol of choice. Instead, in a section called “The Impact on Blood Sugar,” Atkins writes:

When you look at most food labels, you won’t see a number representing the grams of carbs that impact your blood sugar. These high-glycemic carbs are the carbs that you need to count known as the Net Carb count. Fortunately, you don’t have to be a food scientist or math whiz to figure it out. To calculate the carbs that count, simply subtract the number of grams of dietary fiber from the total number of carbohydrate grams.

Atkins science allows us to calculate Net Carbs in our products more accurately. In addition to subtracting grams of dietary fiber from total carbohydrates, we’re able to account for glycerin and other ingredients that have minimal impact on blood sugar levels that might now show up on a standard food label. We can also check Net Carbs using analytical techniques. But what is important for you to know is that all Atkins bars and shakes are low in Net Carbs.⁶

B. Atkins’ Specific Claims Regarding “Net Carbs”

24. Atkins’ website at www.atkins.com explains its definition of “Net Carbs” as “the total carbohydrate content of the food minus the fiber content and sugar alcohols.” It further claims, “The Net Carbs number reflects the grams of carbohydrate the significantly impact your blood sugar level and therefore are the only carbs you need to count when you do Atkins.”

25. Atkins claims its “Net Carb” calculation is based on “science.”

26. Atkins further claims:

Net Carbs are the carbohydrates that significantly impact the blood-sugar level; they’re the only carbs that count when following Atkins. The good news is that the grams of carbohydrate in fiber, glycerine, and sugar alcohols don’t break down and

⁵ <https://www.atkins.com/how-it-works/library/articles/how-to-read-a-food-label> (last accessed Dec. 19, 2018)

⁶ <https://www.atkins.com/how-it-works/library/articles/how-to-read-a-food-label> (last accessed Dec. 19, 2018).

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

convert to blood sugar and need not be counted by people on the ANA. ... So Net Carbs represent the number of grams of total carbohydrate minus those that do not impact blood sugar.⁷

27. Atkins manufactures, distributes, markets, advertises, and sells products containing sugar alcohols as replacements for ordinary carbohydrates.

28. Maltitol is the sugar alcohol of Atkins' choice. For example, it is (or has been)⁸ a leading ingredient in the following Atkins' products: (a) Blueberry Greek Yogurt Bar; (b) Chocolate Peanut Butter Pretzel Bar; (c) Strawberry Almond Bar; (d) Cinnamon Bun Bar; (e) Chocolate Chip Granola Bar; (f) Chocolate Peanut Butter Bar; (g) Cookies n' Crème Bar; (h) Mudslide Bar; (i) Chocolate Chip Cookie Dough Bar; (j) Triple Chocolate Bar; (k) Caramel Chocolate Peanut Nougat Bar; (l) Caramel Double Chocolate Crunch Bar; (m) Cashew Trail Mix Bar; (n) Coconut Almond Delight Bar; (o) Dark Chocolate Almond Coconut Crunch Bar; (p) Caramel Chocolate Nut Roll; (q) Dark Chocolate Decadence Bar; (r) Chocolate Chip Crisp Bar; (s) Chocolate Hazelnut Bar; (t) Chocolate Oatmeal Fiber Bar; (u) Cranberry Almond Bar; (v) Chocolate Covered Almonds; (w) Chocolate Candies; (x) Chocolate Peanut Candies; (y) Caramel Nut Chew Bar; (z) Chocolate Caramel Mousse Bar; (aa) Chocolate Coconut Bar; (bb) Nutty Fudge Brownie; (cc) Peanut Butter Cups; (dd) Peanut Caramel Cluster Bar; and (ee) Sweet & Salty Trail Mix. The Atkins "Net Carb" formula subtracts all grams of sugar alcohol from carbohydrates. For example, its "Chocolate Candies" product claims to have just "1g Net Carb."

⁷ See <http://www.atkins.com/Science/Articles---Library/Carbohydrates/The-Blood-Sugar-Roller-Coaster--Excess-Carbs,-Exce.aspx>.

Atkins removed this page from its website after litigation commenced. It can be found via the Internet Wayback Machine at: <https://web.archive.org/web/20140930191256/http://www.atkins.com/Science/Articles---Library/Carbohydrates/The-Blood-Sugar-Roller-Coaster--Excess-Carbs,-Exce.aspx>.

⁸ Defendant began removing maltitol from products after the commencement of litigation.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.



29. The ingredients panel for Atkins' Chocolate Candies reveals the following:

Nutrition Facts	
Serving Size 1 pack (28g)	
Amount Per Serving	
Calories 110	Fat Cal. 60
% Daily Value*	
Total Fat 7g	11%
Saturated Fat 4.5g	23%
Trans Fat 0g	
Cholesterol <5mg	1%
Sodium 5mg	0%
Potassium 60mg	2%
Total Carbohydrate 19g	6%
Dietary Fiber 4g	16%
Sugars 1g	
Sugar Alcohols 14g	
Protein 1g	1%
Vitamin A 0%	Vitamin C 0%
Calcium 2%	Iron 2%
Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.	
	Calories 2,000 2,500
Total Fat	Less than 65g 80g
Saturated Fat	Less than 20g 25g
Cholesterol	Less than 300mg 300mg
Sodium	Less than 2,400mg 2,400mg
Potassium	2,500mg 3,500mg
Total Carbohydrate	300g 375g
Dietary Fiber	25g 30g
Protein	50g 65g

★ Sugar Alcohols total includes 0g of glycerin.

INGREDIENTS: CHOCOLATE COATING (MALTITOL, COCOA BUTTER, INULIN, UNSWEETENED CHOCOLATE, WHOLE MILK POWDER, MILK FAT, COCOA POWDER (PROCESSED WITH ALKALI), SOY LECITHIN, VANILLA, NATURAL FLAVORS, SUCRALOSE), MALTITOL, LESS THAN 1% OF PURE VANILLA EXTRACT, CONFECTIONER'S GLAZE, CARNAUBA WAX, BEESWAX, TITANIUM DIOXIDE COLOR, YELLOW 5 LAKE, RED 40 LAKE, BLUE 1 LAKE, BLUE 2 LAKE, YELLOW 6 LAKE, YELLOW 6, GUM ARABIC. FRO1
CONTAINS MILK AND SOY.
THIS PRODUCT IS MANUFACTURED IN A FACILITY THAT USES PEANUTS, OTHER TREE NUTS AND WHEAT.

30. Thus, Atkins starts with 19g of total carbs then subtracts 4g of Dietary Fiber and 14g of Sugar Alcohols to arrive at a Net Carbs claim of just 1 gram. The ingredient list reveals “maltitol” is most significant ingredient of the product.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

31. By this calculation, Atkins assigns a carbohydrate value of zero to maltitol and any other sugar alcohols for this product.

32. On the same product, Atkins also includes the following text box on the products packaging:



33. An identical or substantially similar claim appears on every Atkins' product identified in paragraph 28.

34. But, as described below, sugar alcohols do impact blood sugar more than a minimal amount, and Atkins' "Net Carb" count does not assist consumers with tracking carbohydrates that impact blood sugar because it omits sugar alcohols from its equation.

35. Further, this claim conflicts with the diet espoused by Dr. Atkins in his books. Indeed, Dr. Atkins stated that to arrive at net carbs, an individual should subtract only carbohydrates associated with fiber. He stated: "Basically, you can deduct the grams of fiber from the food's total carb count. I call the net number of grams, 'The carbs that count when you do Atkins.'" Robert C. Atkins, M.D., *Dr. Atkins' New Diet Revolution* (3rd ed.) at p. 68 (2002). He

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL DESIGNATED
CONFIDENTIAL BY DEFENDANT ATKINS NUTRITIONALS, INC.

further elaborated, “And determining which carbs count is simple: Check the total fiber grams listed on the food label and subtract that number from the total grams of carbohydrate listed.” *Id.* at p. 69. Thus, even Dr. Atkins uses a different carbohydrate calculation than that used by Atkins in its labeling.

36. Atkins does not disclose the conflict between Dr. Atkins’ espoused method of calculating “net carbs” and the method used by the company.

C. Sugar Alcohols Retain Significant Energy Value

37. Contrary to Atkins’ claims, the authoritative scientific research on sugar alcohols, particularly maltitol, shows that they continue to have a significant impact on blood sugar levels.

38. Dr. Regina Castro of the Mayo Clinic warns consumers should “be cautious with sugar alcohols” because they “can increase your blood sugar level.”⁹

39. To Plaintiffs’ knowledge, no independent scientist, doctor, or researcher agrees with Atkins’ assertion that maltitol and other sugar alcohols have a net energy value of zero. Atkins conceals this fact from consumers and does not disclose this fact in its labeling or representations to consumers. The International Table of Glycemic Index and Glycemic Load lists maltitol as having a relative blood sugar impact from between 45 to 127 percent of the impact of white bread (the product regularly used as a control in scientific testing of the impact ingredients and food products have on blood sugar).

40. In the study “Sugar Alcohols and Diabetes: A Review,”¹⁰ Dr. Thomas Wolever explained:

⁹ See <http://www.mayoclinic.org/diseases-conditions/diabetes/expert-answers/artificialsweeteners/faq-20058038>.

¹⁰ See <http://archive.diabetes.ca/files/SugarAlcohols--Wolever--CJDDecember2002.pdf>.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Some people may believe that products sweetened with sugar alcohols allow for more variety in food choices, and, hence, increased quality of life for people with diabetes. However, there is *no evidence* that sugar alcohol-sweetened products have any benefit on long-term glycemic control in people with diabetes.

...

The rationale behind the use of sugar-alcohol sweetened products for weight management is that they reduce both the energy and sugar contents of confectionary. However, the reduction in energy content is not large[.] ... Most sugar alcohols have an energy content 1.0 to 2.0 kcal/g less than sucrose or other carbohydrates, and since tolerance for sugar alcohol intake is limited, their impact on overall energy balance is likely to be, at most, approximately 20 to 40 kcal/day.

Thomas Wolever, M.D. Ph.D., “Sugar Alcohol and Diabetes: A Review,” Canadian Journal of Diabetes 2002; 26(4): 356-362.

41. Ordinary carbs have an energy value of approximately four calories per gram.
42. Maltitol has an energy value of approximately three calories per gram, 25 percent less than the energy value of an ordinary carb.¹¹
43. Dr. Wolever found that 50 to 75 percent of maltitol is absorbed into the body.
44. By multiplying the energy value by the percent of the sugar alcohol absorbed by the body, one can arrive at the carb value of a sugar alcohol relative to an ordinary carbohydrate. Thus, total carbohydrate energy consumed per gram of maltitol is actually between 38 to 56 percent of the carbohydrate value of table sugar or ordinary carbohydrates.

45. Thus, according to this scientifically sound calculation, the true “Net Carbs” in Atkins “Chocolate Candies” product would be between 6.32 and 8.84 grams instead of the 1 gram fraudulently claimed by Atkins. Accordingly, just as one example, the “Chocolate Candies”

¹¹ See <http://www.inspection.gc.ca/food/labelling/food-labelling-for-industry/nutrition-labelling/elements-within-the-nutrition-facts-table/eng/1389206763218/1389206811747?chap=1>.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL DESIGNATED
CONFIDENTIAL BY DEFENDANT ATKINS NUTRITIONALS, INC.

product has a “net carb” value of between 632 to 884 percent times as high as that claimed by Atkins.

46. In 2004, Dr. Wolever told the New York Times, “It’s a big misconception to say maltitol does not raise blood sugar.” Instead, he explained, “Sugar alcohols have come on the market quite aggressively and it’s very confusing. The science is not good.”¹²

47. In 2004, Atkins had Wolever test the actual impact its products have on blood sugar. The testing revealed Atkins’ chocolate candies actually had 10.9 grams of impact on blood sugar according to the most widely-used scientifically-valid measure, and 7 grams of impact according to a secret untested method employed by Atkins.

48. After Wolever’s testing, Atkins appeared to agree with the consensus that food labels concerning sugar alcohols were misleading. It announced that it would discontinue using the term “Net Carbs” on its food labels because the term is “imprecise.” Sarah Ellison, *Atkins Labels Will Drop Term ‘Net Carbs’*, THE WALL STREET JOURNAL, Oct. 6, 2004 (available at <http://www.wsj.com/articles/SB109700319191636814>). According to the article:

As low-carb products have proliferated, the food industry has faced increasing skepticism about their nutrient content and labeling. For example, many companies, including Atkins at one time, calculate a products “net carbs” by subtracting grams of fiber and sugar alcohols from the total carbohydrate grams. That calculation allows food makers to cook up starchy, sweet products like brownies, pastries and candy, and call them “low carb.” **But one thing the calculation doesn’t take into account is that sugar alcohols raise blood-sugar levels, just as “net carbs” do.**

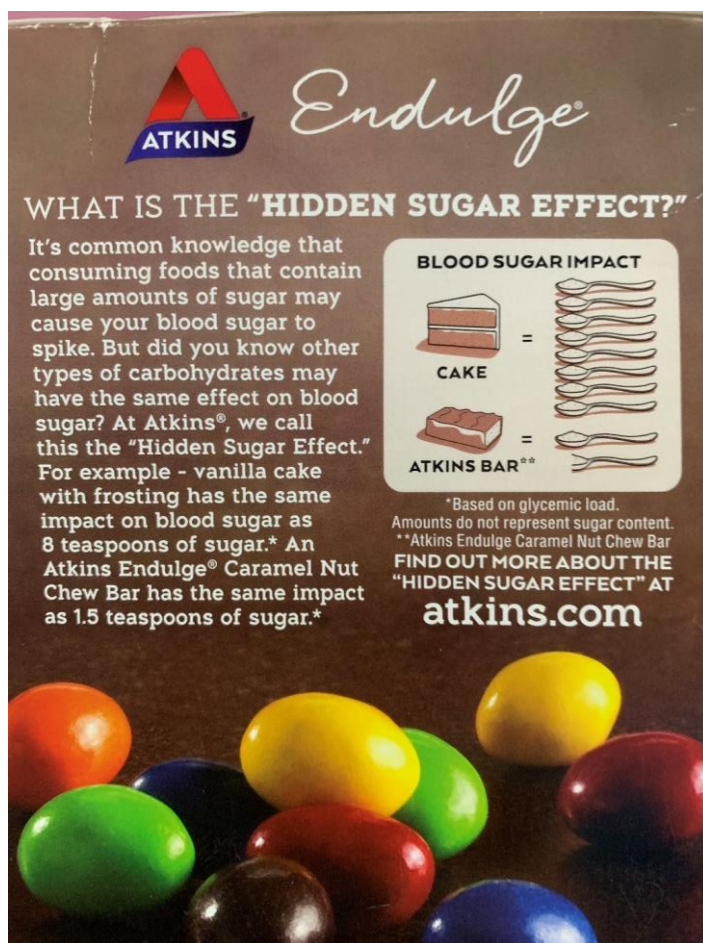
Id. (emphasis added).

¹² See Burros, Marian, “New ‘Low-Carb’ Foods Aren’t All-You-Can-Eat, N.Y. Times, Apr. 14, , available at <http://www.nytimes.com/learning/students/pop/20040415snapthursday.html>

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

49. Nonetheless, despite acknowledging that the term “net carbs” is “imprecise” and that sugar alcohols impact blood sugar levels, Atkins continues to use the term in its labeling and to tell consumers that sugar alcohols have a “minimal” impact on blood sugar levels – a conclusion that it publicly rejected in 2004.

50. Atkins’ current packaging illustrates that its net carb statements are false and misleading. Atkins’ “Hidden Sugar” statements inform consumers:



51. There are 4.26 grams in a teaspoon. By stating that the “Atkins Endulge Caramel Nut Chew Bar” has the same impact of 1.5 teaspoons of sugar, Atkins is stating that it has 6.4

PUBLIC REDACTED VERSION –CONTAINS DISCOVERY MATERIAL DESIGNATED
CONFIDENTIAL BY DEFENDANT ATKINS NUTRITIONALS, INC.

grams of ingredients that impact blood sugar. And yet, the current packaging for the Atkins Endulge Caramel Nut Chew Bar contains just two grams of ingredients that impact blood sugar.

D. Atkins Uses “Net Carbs” to Illegally Imply Its Products are “Low Carb”

52. Under the NLEA, a product may not contain a statement about the amount of a nutrient if the statement in any way implicitly characterizes the level of the nutrient in the food or is false or misleading in any respect.

53. In 2004, Atkins’ conceded that consumers are confused between “low-carb” and “net-carb” and equated the terms. At the same time that it announced its net carb labels were inaccurate, Atkins stated, “Today many food labels are confusing. The terms ‘low-carb’ and ‘net carb’ have no standardized definition, but they have already become buzzwords used by many other food manufacturers who may know little about formulating products that work on that Atkins Nutritional Approach.”

54. Excerpts from publicly-filed investor reports and presentations from The Simply Good Food Company, the parent company of Defendant Atkins, repeatedly describe Atkins as “an iconic American brand that for many consumers stands for ‘low carb,’ ‘low sugar’ and ‘protein rich’ nutrition. Quarterly earnings reports repeatedly emphasize that Atkins’ target consumers are “program buyers” on the eponymous Atkins’ low-carb diet and “self-directed low carbers.”

55. Consumer survey data disclosed in discovery in related litigation supports these statements to investors:

[REDACTED]

[REDACTED]

[REDACTED]

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

[REDACTED]

[REDACTED]

[REDACTED]

56. It is illegal under the NLEA for a food manufacturer to label its products as “low carb” or to imply that a product is low in carbohydrates.

57. Atkins uses the “net carb” term to imply that the product is low in carbohydrate and that consumers should not count certain carbs.

[REDACTED] Internal documents revealed in discovery in related litigation [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS NUTRITIONALS,
INC.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

62. “Net carb” is a marketing term created by Atkins as a measure for consumers to evaluate low carb qualities.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PUBLIC REDACTED VERSION - CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

E. Atkins Conceals Material Facts and Its Representations are False

66. Atkins' "Net Carb" claims are false, misleading, and likely to deceive consumers, such as Plaintiffs and members of the Class, in that Atkins' products have multiple times the level of carbohydrates that impact blood sugar as labeled by Atkins' Net Carb claim because sugar alcohol continues to have an effect on blood sugar and calories in direct contradiction to Atkins' claims.

67. Within the past two years, Plaintiff Joseph Colella purchased the following Atkins' products. All of these products contain sugar alcohol (including maltitol), and the Net Carbs claim on each product states, "Atkins Net Carb Count assists you in tracking carbs that impact blood sugar. Fiber and sugar alcohols should be subtracted from the total carbs since they minimally impact blood sugar."

Atkins Product	Approximate Date	Location	Purchase Price
Chocolate Chip Cookie Dough Bar	Routinely from 2016-2018	Wal-Mart # 5293 77 Green Acres Mall Valley Stream, NY	\$6.98 (5 pack)
Sweet & Salty Trail Mix	Routinely from 2016-2018	Wal-Mart # 5293 77 Green Acres Mall Valley Stream, NY	\$5.78
Chocolate Peanut Candies	Routinely from 2016-2018	Wal-Mart # 5293 77 Green Acres Mall Valley Stream, NY	\$5.48 (5 pack)

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

68. Within the past two years, Plaintiff Joseph Timmerman purchased the following Atkins products. All of these products contain sugar alcohol (including maltitol), and the Net Carbs claim on each product states, “Atkins Net Carb Count assists you in tracking carbs that impact blood sugar. Fiber and sugar alcohols should be subtracted from the total carbs since they minimally impact blood sugar.”

Atkins Product	Approximate Date	Location	Purchase Price
Chocolate Candies	Feb. 2, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	Feb. 2, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	Feb. 2, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	Feb. 13, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	Feb. 13, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	Feb. 13, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	April 2, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	April 2, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	April 2, 2018	Stop & Shop #526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	April 8, 2018	Stop & Shop # 516 1100 East Jericho Turnpike Huntington, NY	\$6.51
Trail Mix	April 8, 2018	Stop & Shop # 516 1100 East Jericho East Turnpike	\$5.39

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Atkins Product	Approximate Date	Location	Purchase Price
		Huntington, NY	
Mudslide Bar	April 8, 2018	Stop & Shop # 516 1100 East Jericho Turnpike Huntington, NY	\$7.78
Chocolate Candies	May 1, 2018	Stop & Shop # 516 1100 East Jericho Turnpike Huntington, NY	\$6.51
Trail Mix	May 1, 2018	Stop & Shop # 516 1100 East Jericho Turnpike Huntington, NY	\$5.39
Mudslide Bar	May 1, 2018	Stop & Shop # 516 1100 East Jericho Turnpike Huntington, NY	\$7.78
Chocolate Candies	May 22, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	May 22, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	May 22, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	July 21, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	July 21, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	July 21, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	Aug. 11, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	Aug. 11, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	Aug. 11, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Atkins Product	Approximate Date	Location	Purchase Price
Chocolate Candies	Aug. 25, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	Aug. 25, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	Aug. 25, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	Sept. 6, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	Sept. 6, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	Sept. 6, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	Sept. 16, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	Sept. 16, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	Sept. 16, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	Sept. 25, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	Sept. 25, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39
Mudslide Bar	Sept. 25, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	Oct. 18, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$6.51
Trail Mix	Oct. 18, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$5.39

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Atkins Product	Approximate Date	Location	Purchase Price
Mudslide Bar	Oct. 18, 2018	Stop & Shop # 526 3126 Jericho Turnpike East Northport, NY	\$7.78
Chocolate Candies	Nov. 16, 2018	Stop & Shop # 516 1100 East Jericho Turnpike Huntington, NY	\$6.51
Trail Mix	Nov. 16, 2018	Stop & Shop # 516 1100 East Jericho Turnpike Huntington, NY	\$5.39
Mudslide Bar	Nov. 16, 2018	Stop & Shop # 516 1100 East Jericho Turnpike Huntington, NY	\$7.78

69. Within the past two years, Plaintiff Kelly Styles Longo purchased the following Atkins products, among others. All of these products contain sugar alcohol (including maltitol), and the Net Carbs claim on each product states, “Atkins Net Carb Count assists you in tracking carbs that impact blood sugar. Fiber and sugar alcohols should be subtracted from the total carbs since they minimally impact blood sugar.”

Atkins Product	Approximate Date	Location	Purchase Price
Chocolate Peanut Butter Meal Bar	Routinely from 2016-2018	Wegmans 8270 Transit Road Williamsville, NY	\$9.72
Chocolate Peanut Butter Meal Bar	Routinely from 2016-2018	TOPS Friendly Markets 2351 Maple Road Williamsville, NY	\$9.72
Chocolate Peanut Butter Meal Bar	Routinely from 2016-2018	Wal-Mart 5033 Transit Road Williamsville, NY	\$9.72

70. Within the past two years, Plaintiff Sandra Styles-Horvath purchased the following Atkins products. All of these products contain sugar alcohol (including maltitol), and the Net Carbs

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL DESIGNATED
CONFIDENTIAL BY DEFENDANT ATKINS NUTRITIONALS, INC.

claim on each product states, “Atkins Net Carb Count assists you in tracking carbs that impact blood sugar. Fiber and sugar alcohols should be subtracted from the total carbs since they minimally impact blood sugar.”

Atkins Product	Approximate Date	Location	Purchase Price
Chocolate Chip Cookie Dough Bar	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Chocolate Peanut Butter Bar	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Chocolate Peanut Butter Pretzel Bar	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Classic Trail Mix	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans	\$6.59 to \$7.99

PUBLIC REDACTED VERSION– CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Atkins Product	Approximate Date	Location	Purchase Price
		370 Orchard Park Rd. West Seneca, NY 14224	
Sweet & Salty Trail Mix	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Caramel Chocolate Nut Roll	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Coconut Almond Delight Bar	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Chocolate Oatmeal Fiber Bar	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Atkins Product	Approximate Date	Location	Purchase Price
Caramel Nut Chew Bar	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Chocolate Candies	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Chocolate Caramel Mousse Bar	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$7.99
Chocolate Covered Almonds	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Milk Chocolate Caramel Squares	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY	\$6.59 to \$7.99

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Atkins Product	Approximate Date	Location	Purchase Price
		AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	
Peanut Butter Cups	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99
Peanut Caramel Cluster Bar	Routinely from 2016-2018	TOPS Friendly Market 355 Orchard Park Road West Seneca, NY AND Wegmans 370 Orchard Park Rd. West Seneca, NY 14224	\$6.59 to \$7.99

71. The products that Plaintiffs purchased contained the “Counting Carbs” box on the packaging identified in paragraph 32, *supra*, including the statement that sugar alcohols are not a carb that counts, i.e. “Counting Carbs? Atkins Net Carb Count assists you in tracking carbs that impact blood sugar. Fiber and sugar alcohols should be subtracted from the total carbs since they minimally impact blood sugar.” Thus, the products that Plaintiffs purchased represented that sugar alcohols have only a “minimal” impact on consumers’ blood sugar and that sugar alcohols, including maltitol, are not carbohydrates that “impact blood sugar.” In this respect, the

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL DESIGNATED
CONFIDENTIAL BY DEFENDANT ATKINS NUTRITIONALS, INC.

representations on Atkins' products purchased by Plaintiffs were fraudulent, misleading, and concealed material facts (i.e. that sugar alcohols impact blood sugar).

72. Defendant's false representations and omissions were likely to, and do, in fact, mislead reasonable consumers acting reasonably under the circumstances.

73. Furthermore, ordinary and reasonable consumers would not purchase Atkins' products containing the "Net Carbs" designation if they knew the facts and information that Atkins concealed from consumers.

74. Plaintiffs and members of the Class have been economically damaged by their purchase of Atkins' products, in that they spent money on products that they would not have purchased if they had known the true facts and information that Atkins concealed and misled consumers about, specifically that sugar alcohols do not impact blood sugar.

75. Atkins charges a premium for its products and specifically markets them in a premium location of its retailers; thus, Plaintiffs and members of the Class paid more than they normally would have for comparable products. In this respect, Plaintiffs and members of the Class have overpaid for Atkins products contained the "Net Carbs" calculation.

76. The following chart represents the approximate price premiums for certain Atkins' products based on a price per ounce comparison. Plaintiffs purchased the following Atkins products and paid the approximate premium as set forth herein:

PUBLIC REDACTED VERSION– CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Atkins Flavor	Price / Oz.	Comparison	Price / Oz.	Premium
Chocolate Candies	\$0.914	M&Ms	\$0.223	4.10
Sweet & Salty Trail Mix	\$1.020	Planter's SS Tr. Mix	\$0.830	1.23
Choc. Chip Cookie Dough	\$0.706	Snicker's	\$0.289	2.44
Chocolate Peanut Butter Pretzel Bar	\$0.883	Hershey's Gold PB & Pretzel	\$0.345	2.56
Chocolate Peanut Butter Meal Bar	\$0.734	Butterfinger	\$0.298	2.46
Coconut Almond Delight	\$0.746	Almond Joy	\$0.250	2.98
Caramel Choc. Nut Roll	\$0.746	Snicker's	\$0.289	2.58
Caramel Nut Chew	\$0.965	Snicker's	\$0.298	3.24
Chocolate Caramel Mousse	\$0.965	3 Musketeer's	\$0.346	2.79
Peanut Butter Cups	\$0.913	Reese's Peanut Butter Cups	\$0.297	3.07
Peanut Caramel Cluster	\$0.913	Pay Day	\$0.300	3.04
AVERAGE PREMIUM				277 percent

CLASS ACTION ALLEGATIONS

77. Under Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs bring this action on behalf of themselves and the following proposed Class:

Consumers who purchased in the State of New York Atkins' products that contained sugar alcohols and were sold in packaging that represented that sugar alcohols do not impact blood sugar and omitted that sugar alcohols impact blood sugar.

78. Excluded from the Class are Defendant, any affiliate, parent, employee or subsidiary of Defendant; any officer, director, or employee of Defendant; anyone employed by counsel for Plaintiffs in this action; and any Judge to whom this case is assigned as well as his or her immediate family.

79. This action has been brought and may be properly maintained as a class action under Federal Rule of Civil Procedure 23.

80. **Numerosity of the Class – Rule 23(a)(1).** Class members are so numerous that their individual joinder is impracticable. While the exact number of class members is unknown to

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL DESIGNATED
CONFIDENTIAL BY DEFENDANT ATKINS NUTRITIONALS, INC.

Plaintiffs at the present time and can only be ascertained through appropriate discovery, Plaintiffs believes that there are thousands of class members located throughout New York.

81. **Existence and Predominance of Common Questions of Law and Fact – Rule 23(a)(2), 23(b)(3).** Common questions of law and fact exist as to all members of the Class and predominate over questions affecting only individual Class members. These common legal and factual questions, each of which may also be certified under Rule 23(c)(4), include the following:

- a. Whether Atkins misrepresented / concealed the sugar alcohol content on the label of its products identified with the “Net Carbs” designation;
- b. Whether Atkins misrepresented the impact sugar alcohols have on blood sugar, and/or wrongfully omitted that sugar alcohols impact blood sugar;
- c. Whether Atkins misbranded its products when it stated they have “Only” a certain number of Net Carbs;
- d. Whether Atkins was aware of its deception and/or omissions;
- e. Whether Atkins’s deception is material;
- f. Whether Atkins concealed or omitted the true nature of its product;
- g. Whether Atkins profited from its misconduct;
- h. Whether Atkins’s conduct harmed Plaintiffs and the Class;
- i. Whether Atkins has engaged in unlawful, unfair, or fraudulent business practices in violation of New York law; and
- j. Whether Plaintiffs and the other Class members are entitled to equitable relief, including declaratory relief, restitution, and/or rescission.

82. **Typicality – Rule 23(a)(3).** Plaintiffs’ claims are typical of the claims of the Class because, among other things, Plaintiffs purchased Atkins products bearing the “Net Carbs” label that contained sugar alcohols, including products that contain the misrepresentations and omissions alleged herein.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

83. **Adequacy of Representation – Rule 23(a)(4).** Plaintiffs will fairly and adequately protect the interests of Class members. Plaintiffs have retained counsel competent and experienced in complex class action litigation, and Plaintiffs will prosecute this action vigorously. Plaintiffs have no interests adverse or antagonistic to those of the Class.

84. **Superiority - Rule 23(b)(3).** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members are small compared with the burden and expense that would be entailed by individual litigation of their claims against Defendant. It would thus be virtually impossible for the Class members, on an individual basis, to obtain effective redress for the wrongs done them. Furthermore, even if Class members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

85. As an alternative to class certification under Rule 23(b)(3), the proposed Class may be certified under 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making declaratory relief appropriate with respect to the Class.

COUNT ONE
Violation of N.Y. Gen. Bus. Law § 349
(Deceptive and Unfair Trade Practices)

86. Plaintiffs incorporate and re-allege all paragraphs previously alleged herein.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

87. Plaintiffs assert this cause of action on behalf of themselves individually and the proposed Class against Defendant under New York Gen. Bus. Law § 349, which protects consumers against deceptive acts or practices in the conduct of any business.

88. Atkins’ “Net Carb” claims represent that Atkins’ products have a very low amount of carbohydrates compared to their competitors, and a very low amount of carbs that impact blood sugar.

89. Atkins’ marketing and packaging schemes equate the term “Net Carb” with “low carb” and such an association is a material fact for consumers who purchase Atkins products.

90. Atkins’ marketing and packaging schemes claim sugar alcohols have minimal impact on blood sugar and such claim is a material fact for consumers who purchase Atkins products.

91. Atkins’ marketing and packaging schemes claim sugar alcohols do not count as carbs that impact blood sugar and such claim is a material fact for consumers who purchase Atkins products.

92. Atkins’ marketing and packaging schemes use its “net carb” claims to imply that its products are low carb products, and such implied claims are material facts for consumers who purchase Atkins products.

93. Throughout the class period, Atkins engaged in deceptive business acts and/or practices by:

- a. Marketing, advertising, and selling products with the “Net Carbs” label claims that sugar alcohols do not or only “minimally” impact blood sugar, even though sugar alcohols do impact blood sugar; and
- b. Marketing, advertising, and selling products with the assertion that sugar alcohols do not count as carbohydrates that impact blood sugar;

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

- c. Omitting that sugar alcohols do impact blood sugar;
- d. Asserting that Atkins' products have extremely low amount of carbohydrates that "impacted blood sugar" when that is not true; and
- e. Marketing, advertising, and selling products using the "Atkins" name without disclosing and omitting that the products were not consistent with the philosophy of the diet and company's eponymous founder.
- f. Marketing, advertising, and selling products with net carb claims to imply that its products are low carb products.

94. Defendant's acts and omissions described herein misled Plaintiffs and class members about facts of the product that could not reasonably be known by them.

95. Defendant's deceptive acts and omissions described herein were made knowingly with the intent to cause Plaintiffs and class members to underestimate the carbohydrate impact of Defendant's products.

96. Defendant's deceptive acts and omissions were directed at consumers.

97. As a direct result of Atkins's deceptive business acts and/or practices, Plaintiffs and members of the Class suffered injury in fact and lost money or property.

a Plaintiffs and other reasonable consumers acting reasonably under the circumstances would not have purchased Defendant's products but for the deceptive business acts and/or practices; and

b Plaintiffs and other reasonable consumers acting reasonably under the circumstances paid a price premium for Defendant's products based on Defendant's deceptive business acts and/or practices

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

98. Defendant's conduct in employing these deceptive business acts and/or practices was malicious, willful, wanton, and outrageous such as to shock the conscious of the community and therefore warrants imposition of punitive damages in an amount to be determined by a jury.

99. Defendant's deceptive business acts and practices impact the public interest because Plaintiffs and class members were injured in exactly the same way as thousands of others purchasing the products.

100. Defendant's deceptive business acts and/or practices are likely to mislead reasonable consumers in the future. Had Plaintiffs and class members known the true facts about the products, they would not have purchased them at all, much less at their inflated price.

101. Accordingly, Plaintiffs, on behalf of themselves and the Class, seeks the greater of \$50 per class member or actual damages, whichever is greater, plus attorney's fees.

102. Plaintiffs also seek an injunction to enjoin the deceptive practices alleged herein.¹³

COUNT TWO
Violation of New York Gen. Bus. Law § 350
(False Advertising)

103. Plaintiffs incorporate and re-allege all paragraphs previously alleged herein.

104. Plaintiffs asserts this cause of action on behalf of themselves and the Class against Defendant under GBL § 350, which declares unlawful "[f]alse advertising in the conduct of any business, trade, or commerce." As defined in the Act, false advertising includes "advertising, including labeling of a commodity ... if such advertising is misleading in a material respect" taking into account "the extent to which the advertising fails to reveal facts material in light of ... representations [made] with respect to the commodity. ..." GBL § 350-a(1).

¹³ Plaintiffs' request for injunctive relief is preserved for appeal.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

105. Defendant has been and continues to be engaged in the “conduct of ... business, trade, or commerce” under GBL § 350.

106. Throughout the class period, Defendant caused to be made and disseminated throughout New York statements that were untrue and misleading. These statements were made on the Defendant’s product labels, its website, and in general advertising.

107. Defendant knew, or, in the exercise of reasonable care, should have known that its statements were untrue and misleading to Plaintiffs and class members.

108. Defendant’s untrue and misleading statements were material and substantially uniform in their content, presentations, and impact upon Plaintiffs and class members.

109. Defendant’s untrue and misleading statements were material and likely to deceive a reasonable consumer. As a direct result of Atkins’s false advertising, Plaintiffs and members of the Class suffered injury in fact and lost money or property.

110. Defendant’s conduct in employing these deceptive business acts and/or practices was malicious, willful, wanton, and outrageous such as to shock the conscious of the community and therefore warrants imposition of punitive damages in an amount to be determined by a jury.

111. Accordingly, Plaintiffs on behalf of themselves and the Class, seek relief against Atkins in the form of an order prohibiting Atkins from engaging in the alleged misconduct described herein, and other relief as specifically prayed for herein. ¹⁴

¹⁴ Plaintiffs’ request for injunctive relief is preserved for appeal.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

COUNT THREE¹⁵
Breach of Express Warranty

112. Plaintiffs incorporate by reference and re-allege all paragraphs previously alleged herein.

113. Plaintiffs assert this cause of action on behalf of themselves and the proposed Class against Defendant for breach of express warranty.

114. Defendant provided Plaintiffs and class members with written express warranties that its products contained minimal “net carbs” and that any sugar alcohols contained therein had minimal and effectively no impact on blood sugar. These “Net Carb” claims are affirmations of fact that were a basis of the bargain between Plaintiffs (and class members) and Defendant.

115. The written affirmations of fact at issue here are the “Net Carb” statements and calculations made on Defendant’s products, which include but are not limited to:

a. “Atkins Net Carb Count assists you in tracking carbs that impact blood sugar. Fiber and sugar alcohols should be subtracted from the total carbs since they minimally impact blood sugar.”

b. Atkins used a Net Carbs mathematical formula that subtracted all sugar alcohols from the total carbohydrate count, thereby asserting that sugar alcohols have no impact on blood sugar;

c. An “Xg Net Carbs” or “Only Xg Net Carbs” total placed on the front of each box that, combined with the definition on the back, asserts that each product has a certain limited level of “carbs that impact blood sugar;” and

d. An “Only Xg Net Carbs” representation that improperly suggests a nutrient is absent or present in a certain amount.

¹⁵ Plaintiffs preserve COUNT THREE for appeal.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

116. Defendant's Net Carb claims created an express warranty that the goods would conform to Defendant's stated promises.

117. Defendant's Net Carb claims were material to Plaintiffs and class members in the decision to purchase Defendant's products.

118. Defendant breached its express warranty by not providing goods with the qualities promised.

119. As a direct result of Defendant's breach, Plaintiffs and members of the Class suffered injury in fact and lost money or property.

120. Defendant's conduct in employing these deceptive business acts and/or practices was malicious, willful, wanton, and outrageous such as to shock the conscious of the community and therefore warrants imposition of punitive damages in an amount to be determined by a jury.

121. Accordingly, Plaintiffs on behalf of himself and the Class, seek relief against Atkins in the form of an order prohibiting Atkins from engaging in the alleged misconduct described herein, and other relief as specifically prayed for herein.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Class, request judgment and relief as follows:

A. For an order certifying the proposed Class, and appointing Plaintiffs and their counsel of record to represent the proposed Class;

B. For an order declaring that Atkins has violated N.Y. Gen. Bus. Law § 349;

C. For an order declaring that Atkins has violated N.Y. Gen. Bus. Law § 350;

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

- D. For an order declaring that Atkins has breached an express warranty;¹⁶
- E. For an order awarding Plaintiffs and Class members damages and statutory damages in an amount to be proven at trial, including punitive damages, together with pre-trial and post-trial interest thereon;
- F. For an order awarding Plaintiffs and Class members restitution, disgorgement, or other equitable relief as the Court deems proper;¹⁷
- G. For an order awarding Plaintiffs and the Class reasonable attorneys' fees and costs of suit, including expert witness fees; and
- H. For an order awarding such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs, on behalf of themselves and all similarly situated persons, demand a trial by jury on all issues that are triable to a jury.

¹⁶ Plaintiffs preserve their warranty claim for appeal.

¹⁷ Plaintiffs preserve their request for injunctive relief for appeal.

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

Dated: January 25, 2019

Respectfully submitted,

KAPLAN FOX & KILSHEIMER LLP

/s/ David Straite

David A. Straite
Ralph E. Labaton
850 Third Avenue
New York, NY 10022
dstraite@kaplanfox.com
Tel.: 212.687.1980
Fax: 212.687.7714
Local Counsel for Plaintiffs

Matthew L. Dameron
(admitted *pro hac vice*)
WILLIAMS DIRKS DAMERON LLC
1100 Main Street, Suite 2600
Kansas City, MO 64105
Tel.: 816.945.7110
Fax: 816.945.7118
matt@williamsdirks.com
National Counsel for Plaintiffs

Jay Barnes
(admitted *pro hac vice*)
SIMMONS HANLY CONROY LLC
One Court Street
Alton, IL 62002
Tel.: 618.259.2222
Fax: 618.259.2251
jbarnes@simmonsfirm.com
National Counsel for Plaintiffs

PUBLIC REDACTED VERSION – CONTAINS DISCOVERY MATERIAL
DESIGNATED CONFIDENTIAL BY DEFENDANT ATKINS
NUTRITIONALS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th Day of January 2019, the foregoing document was electronically filed on the Court's CM/ECF system, which effectuated service on the following counsel for Defendant:

Gregory T. Wolf
4520 Main Street, Suite 1100
Kansas City, Missouri 64111
gregory.wolf@dentons.com
carly.duvall@dentons.com

Sandra D. Hauser
1221 Avenue of Americas
New York, New York 10020
Sandra.hauser@dentons.com

Michael J. Duvall
601 South Figueroa Street
Suite 2500
Los Angeles, California 90017-5704
michael.duvall@dentons.com

Grant J. Ankrom
One Metropolitan Square
211 N. Broadway, Suite 3000
St. Louis, Missouri 63102-2741
Grant.ankrom@dentons.com

/s/ Ralph E. Labaton

Ralph E. Labaton
*Local Counsel for Plaintiffs and the
Proposed Class*